

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ERIC P. TALVENSARRI,)	No. CV 08-4255-DDP(CW)
)	
Petitioner,)	ORDER DISMISSING PETITION
)	AS SUCCESSIVE
v.)	
)	
F. GONZALEZ (Acting Warden),)	
)	
Respondent.)	
_____)	

The pro se petitioner is a prisoner in state custody pursuant to a 1997 conviction in California Superior Court, Los Angeles County, Case No. LA022473. [Petition ("Pet.") at 2.] The present petition, filed June 27, 2008, challenges a sentencing enhancement imposed in the 1997 judgment. Petitioner brought a prior habeas petition in this court, Talvensarri v. Roe, No. CV 00-761-DDP(CW), which was denied and dismissed with prejudice in a judgment entered May 12, 2003.¹

¹ In Case No. 00-761 the petitioner's name was given as "Erick" not "Eric." However, records of the two cases show the same middle name ("Paul"), the same CDCR identification number (K-39281), and the same Superior Court case number (LA022473), making it clear that this is the same Mr. Talvensarri, and Petitioner has not disputed this.

1 In an order filed July 9, 2008, in the present case, the court
2 ordered the parties to file briefs concerning whether the present case
3 should be dismissed as successive to No. CV 00-761. [Docket no. 4.]
4 Respondent's brief was filed on November 5, 2008. [Docket no. 11.]
5 Petitioner's reply was filed on November 26, 2008. [Docket no. 14.]
6 It is evident that the present petition is successive, and should be
7 summarily dismissed without prejudice.

8 **LEGAL STANDARD**

9 A new habeas petition under 28 U.S.C. § 2254, which challenges
10 the same state court judgment addressed in one or more prior § 2254
11 petitions, is a second or successive petition. A federal district
12 court may not consider a second or successive petition unless the
13 petitioner has first obtained an order from the proper federal circuit
14 court of appeals authorizing the district court to review the new
15 petition. See 28 U.S.C. § 2244(b)(3)(A). The court of appeals may
16 only authorize review of a second or successive petition in the
17 district court if the petitioner "makes a prima facie showing [to the
18 court of appeals] that the application satisfies the requirements of"
19 28 U.S.C. § 2244(b). See 28 U.S.C. § 2244(b)(3)(C); Felker v. Turpin,
20 518 U.S. 651, 657, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996).

21 "Generally, a new petition is 'second or successive' if it raises
22 claims that were or could have been adjudicated on their merits in an
23 earlier petition." Cooper v. Calderon, 274 F.3d 1270, 1273 (9th Cir.
24 2001). A later petition by the same petitioner will not be successive
25 for purposes of § 2244(b), if, for example, the two petitions address
26 different state court judgments, or the prior petition was dismissed
27 without prejudice. See, e.g., In re Turner, 101 F.3d 1323, 1323 (9th
28 Cir. 1997).

DISCUSSION

There is no indication, in the present case, that Petitioner has obtained an order from the court of appeals authorizing him to file a successive petition. It is undisputed that the present petition raises a challenge to the sentence imposed in the 1997 judgment, and Petitioner has confirmed this in his reply. [See docket no. 14.]

Petitioner was also in custody pursuant to the 1997 judgment at the time he filed the prior petition, No 00-761. The 1997 sentence was based, in part, on a prior conviction in 1990 (also following a plea agreement). The petition in No. CV 00-761 raised three claims, namely: (1) that the enhanced sentence in the 1997 judgment violated the plea agreement in petitioner's 1990 case; (2) that Petitioner received ineffective assistance of counsel in regard to his plea in the 1990 case; and (3) that Petitioner's plea in the 1990 case was invalid. [See No. CV 00-761, docket no. 29, Report and Recommendation ("R&R") at 5, quoting Petitioner's First Amended Petition and Supporting Memorandum, No. CV 00-761, docket nos. 7, 8.] Although all three claims raised in No. CV 00-761 referred to Petitioner's prior, 1990, conviction, at least two of the claims directly challenged the sentence imposed in the 1997 conviction.² The court addressed those claims on their merits, and the petition was denied and dismissed with prejudice in a judgment entered May 12, 2003. [No. CV 00-761, docket no. 32.] This court and the Ninth Circuit also denied Petitioner's requests for a certificate of appealability. [No. CV 00-761, docket nos. 35, 39.]

² In No. CV 00-761, the court also noted that Petitioner could not directly challenge his 1990 conviction on which the sentence had fully expired before he filed that petition in this court. [R&R at 8-9 and n.4.]

1 Thus, both Petitioner's prior and present petitions in this court
2 have challenged his 1997 state court judgment. Furthermore, there is
3 no legal reason that the sole claim in the present petition (also a
4 challenge to the sentence in the 1997 judgment) could not have been
5 raised in the prior petition. Accordingly, the present petition is a
6 second or successive petition under § 2244(b)(3)(A), and is subject to
7 dismissal without prejudice. Petitioner may file a new petition in
8 this court if and only if he first obtains authorization from the
9 Ninth Circuit pursuant to 28 U.S.C. § 2244(b)(3)(A).

10 **ORDERS:**

11 1. It is **ORDERED** that judgment be entered dismissing the
12 petition as successive.

13 2. The clerk shall serve copies of this order and the judgment
14 herein on the parties.

15
16 DATED: May 11, 2010



17
18
19 DEAN D. PREGERSON
United States District Judge

20 Presented by:
21 Dated: February 26, 2010

22
23 /s/
CARLA M. WOEHRLE
24 United States Magistrate Judge